89-1991

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE HOCHHEISER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioner, a well respected criminal defense attorney, was twice summarily fined for criminal contempt for conduct occurring during a heated RICO trial. The Court of Appeals reversed the first contempt conviction because the conduct, which the trial judge had deemed criminal contempt warranting immediate punishment, was instead proper cross-examination. The Court, however, sustained the second contempt -- imposed just moments later-- based solely on ten words of frustration expressed by petitioner in an attempt both to defend himself (by arguing against the first wrongful contempt citation) and his client (by persuading the court that it was wrong to limit cross-examination). The Court upheld the summary conviction on the ground that "[w]ords of reproach directed in open

court to a judge's order during the course of trial must be dealt with swiftly and firmly" (Appendix A, 3a).

The questions presented are:

1. Whether the holding that "words of reproach" alone are summarily punishable as contempt regardless of obstructive effect and intent, should be reversed, not only because it conflicts with the law of this Court, but because a contempt citation imposed on an attorney on such a basis implicates his First Amendment rights and chills vigorous advocacy that effectuates Sixth Amendment guarantees;

2. Whether the criminal conviction of defense counsel for contempt, imposed by a judge holding the unfounded belief that counsel had just deliberately defied her order when he had not, and imposed without providing counsel an opportunity

to present evidence negating intent to obstruct or even to set forth his position on the record, is so violative of Due Process and destructive of the effective defense function that it calls for an exercise of this Court's supervision; and

3. Whether, as the Court of Appeals' holding signifies, a court, merely by imposing immediate punishment for conduct thought offensive by the court during a trial, can thereby justify the use of Rule 42(a) of the Federal Rules of Criminal Procedure, which -- reserved for matters of "compelling necessity"-- deprives the alleged contemnor of Due Process rights to notice and a hearing before a judge other than the judge offended by the perceived misconduct.

PARTIES TO THE PROCEEDINGS

The parties to the contempt proceeding below were attorney Lawrence Hochheiser, and the United States. The defendants in the criminal trial that Mr. Hochheiser was defending and the United States was prosecuting were Federico Giovanelli, Steven Maltese, and Carmine Gualtiere -- none of whom were parties to the contempt appeal.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	17
I. This Court Should Grant The Writ To Assure That The Summary Contempt Power Is Not Abused Or Used For Improper Purposes, As It Was Here, By Punishing "Mere Words" As Contempt Regardless of Intent	17
II. This Court Should Grant The Writ To Enunciate Needed Standards For The Use Of Summary Contempt Power Under Rule 42(a) For Conduct Occurring During A Trial	29

III. This Court Should Grant The Writ To Reverse This Unfair Conviction Found By A Biased Judge, And To Reaffirm Rule 42(b)'s Prohibition Of A Judge Acting As Factfinder In A Criminal Contempt Context Such As Occurred Here 36

CONCLUSION 46

APPENDICES:

APPENDIX A: Slip Opinion of the Court of Appeals 1a

APPENDIX B: Summary Order of the Court of Appeals denying rehearing and rehearing en banc 14a

APPENDIX C: Order of the Court of Appeals granting enlargement of time to file petition for rehearing 16a

APPENDIX D: District Court Certification and Order of Contempt under Rule 42(a) 17a

APPENDIX E: Judgment of Court of Appeals with Mandate 22a

APPENDIX F: Pertinent Statutory Provisions and Rules 24a

TABLE OF AUTHORITIES

Page

Cases:

Bloom v. Illinois,
391 U.S. 194 (1968) 29

Bridges v. California,
314 U.S. 252 (1941) 19

Burks v. United States,
437 U.S. 1 (1978) 44

Codispoti v. Pennsylvania,
418 U.S. 506 (1974) 30, 34

Craig v. Harney,
331 U.S. 367 (1947) 19

In re Dellinger,
461 F.2d 389 (7th Cir. 1972) . . . 12

In re Little,
404 U.S. 353 (1972) 19

In re Lumumba, 741 F.2d 12
(2d Cir. 1984) . . . 24, 26-29, 40, 41

In re McConnell, 370 U.S. 230
(1962) 21-24, 26, 29

In re Snyder,
472 U.S. 634 (1985) 35

In re Williams,
509 F.2d 949 (2d Cir. 1975) 37

Mayberry v. Pennsylvania,
400 U.S. 455 (1970) 27, 29

Nye v. United States,
313 U.S. 33 (1941) 17-19

Offutt v. United States,
348 U.S. 11 (1954) 41

United States v. Giovanelli,
No. 89-1604 (Appeal Pending,
2d Cir. 1990) 4

United States v. Wendy,
575 F.2d 1025 (2d Cir. 1978) . . . 14

United States v. Wilson,
421 U.S. 309 (1975) 31

Yates v. United States,
355 U.S. 66 (1957) 34

Statutes and Rules:

18 U.S.C. § 401 . . . 3, 16, 17, 20, 21, 23, 25, 28, 37

28 U.S.C. § 1254(1) 2

Rule 42, Fed.R.Cr.P. . . . 3, 27, 28, 41

Other Authorities:

Stansbury, Report of the Trial
of James H. Peck on an Impeachment
for High Misdemeanors in Office
(1933) 18

In The
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No. _____

LAWRENCE HOCHHEISER

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Lawrence Hochheiser, an attorney held in criminal contempt for vigorously representing his client in an ongoing criminal trial, respectfully prays that a writ of certiorari issue to review the affirmance of the second of two judgments of conviction for criminal contempt by the United States Court of Appeals for the Second Circuit, entered

on February 15, 1990, as reaffirmed on April 23, 1990.

OPINIONS BELOW

The decision affirming the contempt conviction is reported at 897 F.2d 1227 (2d Cir. 1990); the opinion is reprinted in the appendix hereto ("App.") at 1a-13a. The Certification and Order of Contempt is reproduced at App. 17a-21a.

JURISDICTION

The judgment was entered on February 15, 1990, App. 22a; a timely motion to enlarge the time to file a rehearing petition was granted on March 1, 1990, App. 16a; rehearing was denied on April 23, 1990, App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

18 U.S.C. § 401 and Rule 42, Federal Rules of Criminal Procedure, both governing contempt, are set forth at App. 24a-25a.

STATEMENT OF THE CASE

During the first week of a lengthy RICO trial which, for reasons discussed in the footnote,[1] had already generated a

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[1] Petitioner's client Federico Giovanelli and his two codefendants had been tried twice in New York State court for the murder of a plain-clothed police detective and attempted murder of his partner. All three defendants were acquitted at the first State trial of the attempted murder; the jury acquitted codefendant Gualtiere of the murder at the second State trial and, as at the first trial, could not reach a verdict as to Giovanelli or the other codefendant. The federal government then indicted all three under RICO, with the murder and attempted murder charged as RICO "predicates." The essence of the defense at the federal trial was that government witnesses had tailored testimony after the previous trials' "lack of success." A particular focus was on the credibility of the surviving police officer,

(continued...)

heated pretrial contest, Lawrence Hochheiser, an experienced and respected attorney representing one of three

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[1](...continued)
whose failure in her initial interviews by other police officers (whose reports had been provided to the defense) to immediately identify two of the perpetrators (though the defendants were known to her from months of surveillance) undermined her reliability, and supported the defense that Giovanelli was being robbed by two unknown males when the police officers were caught in the unfortunate confrontation.

The three defendants were convicted after a ten-week trial, and on June 1, 1990, filed an appeal brief arguing, inter alia, that the trial was unfair, because, among other reasons, of: improper restrictions on cross-examination (including orders preventing counsel, in examining witnesses about their testimony in the two prior trials, from eliciting that there even were "prior trials," and orders precluding the introduction of police reports); improper contempt citations and threats of contempt on defense counsel; and admission of unduly prejudicial "organized crime" evidence that had no legitimate bearing on the charges. Although Mr. Hochheiser was required to pursue his own contempt appeal before the trial was completed (because the judge issued a certification which commenced running of the time to appeal), this Court, respectfully, should examine the appeal brief to the Second Circuit in United States v. Giovanelli, 89-1604(L), for it sheds further light on the precipitous contempt citations imposed against petitioner here.

defendants, cross-examined an FBI agent in an effort to establish that his memory was not as accurate as his reports -- a line of examination deemed essential to his client's defense that the omission of critical information from police reports was a significant factor in assessing reliability of testimony about the event.

Though the trial judge excluded police reports (improperly, as was argued below, in that the agents used reports to "refresh" their recollection (Fed.R.Evid. 612)), Mr. Hochheiser sought to question the agents about their method of memory to try to effectively make the point. When he inquired whether the FBI Agent/witness was "relying on [his] recollection" or "telling us that you know it to be so for some other reason?", the prosecutor objected. The court immediately excused the jury and held Mr.

Hochheiser in contempt (as the court had held another of the three attorneys in contempt days earlier[2]) for purportedly defying the court's ruling against admission of the written report. The court stated:

> THE COURT: . . . During the course of this trial the lawyers . . . are going to obey the rulings that I make, and every time a lawyer disobeys a ruling . . . , I'm going to hold the lawyer in contempt and fine the lawyer, as I did Mr. Thau the other day.
>
> So you are now fined $250 for deliberately disobeying my direction with regard to the introduction of that document.

Without permitting a response of any kind on Mr. Hochheiser's part -- which would

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[2] The court held co-counsel (Mr. Thau) in contempt twice during opening statements. The court vacated both citations against Mr. Thau after petitioner and Mr. Thau filed appellate briefs. The defendants' appeal briefs argued that the contempt citations against Mr. Thau and Mr. Hochheiser were improper and that threats of contempt were used to intimidate the defense.

have shown, as it showed the Court of Appeals on appeal, that petitioner was not trying to introduce a document but rather to cross-examine about memory--the judge immediately called for the jury to return. Mr. Hochheiser, quite properly, was trying to protest: "I didn't deliberately do anything, your Honor". But rather than allow him to explain or even establish a record for appeal, the court tried to silence petitioner and to threaten him:

> THE COURT: I have already ruled on it. You can take it to the Court of Appeals. I'm not going to hear any more. There is only one way to bring lawyers into line, and that's to fine them. Before this trial is over, you may be paying a big bill in fines. It is very easy to just disobey the judge's order. Bring in the jury.

(A-182).[3] Mr. Hochheiser's renewed attempt to explain ("I am not--") was cut off again (id.). Both frustrated by the improper ruling, and in an attempt to persuade the court that it was wrong to cut off an important and proper line of defense, Mr. Hochheiser said these ten words: "I won't pay. You can put me in jail, Judge."

Judge Motley, already irritated with Mr. Hochheiser as a result of her mistaken notion that he had flouted her evidentiary ruling, and convinced that defense counsel were engaged in a subversive "contempt plot" as a defense tactic (Tr. 1339),[4] held Mr. Hochheiser

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[3] References to "A" are to the Joint Appendix in the Court of Appeals.

[4] "Tr." refers to the transcript of the trial which Mr. Hochheiser was defending. The court specifically accused the attorneys of being in a "contempt plot" as their tactic of defense (continued...)

in contempt a second time -- this time premised on the unsupported finding that Mr. Hochheiser "deliberately" spoke these ten words in the jury's presence:

> THE COURT: Now, Mr. Hochheiser, you deliberately said that as the jurors were walking in.
>
> MR. HOCHHEISER: I didn't know they were behind me, Judge.
>
> THE COURT: You did know they were behind you.
>
> MR. HOCHHEISER: I didn't know they were behind me. I was talking to you.
>
> THE COURT: For that you are fined $500 for deliberately saying that I could put you in jail, you won't pay it as the jury was coming in. That's $750. You want to keep this up?
>
> MR. HOCHHEISER: The record has to be protected. You intentionally brought them in while I was speaking. You put me in that position.

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[4](...continued)
and warned that there would be no third mistrial in the case (though the mistrials in State court were not caused by misconduct).

> THE COURT: Because you refused to stop talking when I said that was it.
>
> MR. HOCHHEISER: But you can't expect me to know they are walking in behind me when I am addressing the court [A-183].

In her Rule 42(a) Certificate, Judge Motley stated that she had imposed the summary contempt on Mr. Hochheiser for "deliberately challenging and arguing with the court in the presence of the jury . . . and for deliberately attempting to bring about a mistrial" (App. 20a-21a) -- charges that Mr. Hochheiser disputed, but was prevented from defending.

Mr. Hochheiser never disputed that the jurors entered when the judge said they did (from the rear of the courtroom, in the judge's line of sight, but behind Mr. Hochheiser, who was facing the judge as he addressed her). What he did, and

does, contest was the judge's hasty conclusion that he knew that jurors had begun to re-enter the courtroom, that he had deliberately spoken in the jury's presence, and that he did so for purposes of obstruction.

The Court of Appeals, by its reversal of the first contempt citation, showed that Mr. Hochheiser had good reason to complain and protect the record: his conduct was not contempt at all, much less contempt warranting summary measures, and the trial court should have permitted him to continue his proper cross-examination and build an effective defense for his client. But the Court of Appeals nevertheless affirmed the second citation, on the ground that "[w]ords of reproach directed in open court to a judge's order during the course of trial must be dealt with swiftly and firmly"

(App. 3a). According to the appellate court, these words spoken by Mr. Hochheiser, regardless of intent or even the heat of the existing controversy,[5] were so egregious that their utterance warranted summary contempt, and that he should have no opportunity to explain.

This ruling was made despite the fact that the trial court's objectivity at the

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[5] See In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972):

> Given th[e] extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses [contumacious] intent only if he'd known or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.

We argued below, as we do here, that there was no evidence, much less proof beyond a reasonable doubt, that Mr. Hochheiser's words were spoken with a belief that he was hindering rather than facilitating the search for truth.

moment of imposing the second contempt was plainly open to question. The trial judge's "finding" about petitioner's knowledge and intent came on the heels of her previous, and erroneous, "finding" that Mr. Hochheiser had "deliberately disobeyed" the court's evidentiary order. Nonetheless, though intent to obstruct is an element of criminal contempt, and though there was at least a factual issue raised by the trial court's summary determination of "deliberateness" on petitioner's part in speaking in the jury's presence,[6] the Court of Appeals

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[6] We suggested on appeal (as we do here) that it was obvious that Mr. Hochheiser lacked intent to obstruct, and that the Court should summarily reverse for that reason. But at worst, there was a factual issue of intent and it should have been tried, if at all, by a judge whose impartiality could not be questioned.

That Mr. Hochheiser's defense was legitimate is shown even by the prosecutor's later statement the day the contempt citation was

(continued...)

allowed the trial court its role as witness, accuser and adjudicator, deeming it proper to tar petitioner with a criminal conviction[7] without notice,

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[6](...continued)
imposed: he told the court that he had been able to see the jurors enter the courtroom only because he had "turned around when Mr. Hochheiser was talking and . . . was able to see that a number of the jurors had already come into the room (Tr. 483-86). Other evidence supporting Mr. Hochheiser's defense is shown in footnote 8 hereof.

[7] The Court of Appeals once commented on the serious effects of a criminal contempt citation on an attorney, stating:

> While a simple rebuke or more serious censure by the court might not have the same effect as in the more tightly-knit Bar of England, the more serious exercise of the contempt power is awesome in its implications. A citation is likely to affect the contemnor with a "stigma of antisocial conduct." . . . For a lawyer seeking admission to other bars or to practice before federal agencies, a citation might have considerable economic consequences. . . .

United States v. Wendy, 575 F.2d 1025, 1030 (2d Cir. 1978) (citation and footnote omitted). Mr. Hochheiser has already been asked to respond to disciplinary charges for his criminal contempt

(continued...)

hearing or a chance to present the considerable evidence (discussed in the footnote below) that Mr. Hochheiser did not act with an intent to obstruct the trial or frustrate the search for truth.[8]

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[7](...continued)
conviction — a mandatory inquiry for any conviction for criminal contempt.

[8] Because there never was a chance to present a defense, petitioner could not present testimony of co-counsel, Ira Cooper, whose affidavit was offered on petitioner's rehearing petition in the Court of Appeals. Mr. Cooper confirmed that he had been standing next to Mr. Hochheiser at the time, and even though Mr. Cooper was not addressing the court, as Mr. Hochheiser was, he, too, was unaware that the jury was re-entering the courtroom.

Additionally, had there been a fair hearing on the issue whether he had spoken "deliberately" "in the jury's presence", Mr. Hochheiser could have relied on a statement by the prosecutor (discussed in footnote 6 hereof) that he had only realized the jurors were entering because he had turned around. Further, the judge herself, on other occasions in the trial, had alerted attorneys who were speaking to the court to the fact that the jury was entering the room after she had called for the jury to be brought into the courtroom. (Tr. 6158, Rehearing Pet. Addendum "B").

The Court of Appeals' affirmance of the second summary contempt conviction was unfair and improper. While it might have been proper *if*, as the panel held, mere "[w]ords of reproach directed in open court to a judge's order" or "an insolent remark made directly to the judge" (App. 3a, 11a), constitute contempt under 18 U.S.C. § 401, this Court made clear in a decision years ago, *In re McConnell*, 370 U.S. 230 (1962) -- a decision that this Court should confirm by granting the Writ and reversing--that § 401 cannot be read to permit a finding of contempt on that basis. The law now is plain: absent actual, material obstruction and the *intent* to obstruct, "words of reproach" and "insolent remarks" are not punishable at all, much less by a summary procedure.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant The Writ To Assure That The Summary Contempt Power Is Not Abused Or Used For Improper Purposes, As It Was Here, By Punishing "Mere Words" As Contempt Regardless of Intent

While the Court of Appeals properly looked to 18 U.S.C. § 401 as the source of the federal courts' contempt power, its holding that that provision permits summary punishment for what a judge might deem "words of reproach" and "insolent remarks" ignores the historical limitations of § 401. Those limitations -- precluding contempt for "defiant words" -- were enacted after the impeachment trial of Judge James Peck (discussed in many Supreme Court cases, e.g., Nye v. United States, 313 U.S. 33, 45 (1941)), after Peck had imposed a contempt sanction on an attorney who had insulted the judge and criticized his

opinion. Congress rejected Peck's argument that the function of contempt was to enforce some perceived duty of lawyers "to keep a blaze of glory around judges and the courts".[9] It is thus the law that no person can be punished, much less summarily, for criticizing, challenging, or even insulting the court, so long as the "words of reproach" do not actually materially obstruct the administration of justice.

The Nye Court thus reviewed Judge Peck's narrow escape from impeachment after he held an attorney in contempt for criticizing him, and Congress's immediate action to limit the power of the courts to punish for such perceived "contempt".

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[9] This was apparently a standard used in England, but rejected by Congress under our Constitution. Stansbury, Report of the Trial of James H. Peck on an Impeachment for High Misdemeanors in Office (1933), at 512.

While Nye held that the limitation could be read in a "geographical" manner (and that it prevented imposition of contempt sanctions for conduct committed (including words said) outside of the courtroom context), cases after Nye hold that the same limitations that prohibit findings of contempt for out-of-court conduct (such as for newspaper attacks, see Bridges v. California, 314 U.S. 252 (1941)), apply equally to the courtroom. In re Little, 404 U.S. 353 (1972), citing Craig v. Harney, 331 U.S. 367, 376 (1947) ("[T]he law of contempt is not made for the protection of judges who may be sensitive"). Indeed, these cases not only recognize the possibilities of abuse of the contempt power such as that used by Judge Peck and in this case, but also suggest serious First and Sixth Amendment implications in holding an attorney in

contempt for mere words, which may be spoken in the heat of a vigorous defense.

Though the Court of Appeals purported to recognize that actual obstruction is an element of criminal contempt, it labelled as an "actual obstruction" the supposed "misbehavior" of petitioner's words, in that -- the Court wrote -- they "required the jury, which had just returned to the courtroom, to retire once again and in that way actually obstructed the administration of justice" (App. 13a). However, the main premise of the opinion was the erroneous view that "a judge need not tolerate disrespect . . . in open court" (App. 11a), and that, therefore, words uttered by Mr. Hochheiser that (supposedly) conveyed "disrespect" could be punished immediately under § 401 regardless of obstructive effect or intent.

This premise is dangerous and unsustainable in light of the historical limitations of § 401, discussed above, and In re McConnell, 370 U.S. 230 (1962), in which this Court rejected the very argument accepted by the Second Circuit here (see Government's Brief, McConnell, at 36-37) that "insolent, insulting, defiant, or otherwise disrespectful language to a judge in open court in the course of a trial constitutes punishable contempt" without more. In McConnell, this Court thus reversed the contempt conviction of an attorney who, in open court, "deliberate[ly] defie[d]" the court's ruling in the same manner (if not worse) as did petitioner here: after the trial judge precluded McConnell from questioning on a matter of importance, McConnell, in the jury's presence, challenged the Court (370 U.S. at 234):

> Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.

When the judge stated that he was in fact "stopping" Mr. McConnell, the lawyer persisted, defending his own rights and those of his client in a manner not substantially different from what Mr. Hochheiser did here (id. at 235):

> [W]e have a right to ask the questions, and we proposed to do so unless some bailiff stops us.[10]

Moreover, just as this Court held that there could be no finding of obstruction because McConnell "did not continue to ask questions which the judge had

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10 There is no principled basis to distinguish Mr. Hochheiser's conduct (that is, his words "I won't pay. You can put me in jail, Judge"), and McConnell's words, which can be paraphrased: I will not listen to you, judge, but will ask the questions until you use force (by calling the bailiff).

forbidden" (id.), nothing that Mr. Hochheiser did after saying his ten words constituted an actual obstruction of the trial.[11] The Court of Appeals' holding simply cannot be reconciled with McConnell's conclusion (id. at 236):

> [W]e cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts.

Because the holding of the Court of Appeals that "words of reproach" in open court constitute contempt is so flatly at odds with McConnell and with the limitations of § 401 -- principles which are too vital to the fair and effective

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[11] McConnell did not continue asking questions after "proposing" to do so. Likewise, Mr. Hochheiser "proposed" not paying, but in fact lawfully sought (and obtained) stays of the fine (see App. 21a) and in fact paid his fine shortly after the denial of rehearing below.

functioning of the adversary system for courts to ignore or misapply -- the Court should grant certiorari and reverse the conviction.

Nor can the Court of Appeals' holding be distinguished from McConnell on the ascription of obstructive effect to Mr. Hochheiser's words here. McConnell made it clear that a de minimus interruption of the trial -- the court's decision to send the jury out of the courtroom for a recess -- is not "obstruction"; indeed, in McConnell, as here, a recess was called immediately after the attorney's "challenging words", also "requiring" the jury to "retire".[12] Nor, most

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[12] The record contains no suggestion that any juror heard what Mr. Hochheiser said; indeed, the trial court refused to voir dire the jurors upon the government's request (Tr. 483-86). Even had jurors heard, of course, that would not be determinative: McConnell spoke in front of the jury, as did the attorney in In re Lumumba, 741

(continued...)

significantly, was it Mr. Hochheiser's comment that "required" the jury to retire: Judge Motley "retired" the jurors because of her desire at the time to immediately punish Mr. Hochheiser's words -- a sanction improper not only because the judge identified no actual obstruction in the charge she levelled,[13] but because as McConnell made clear, "defiant words" are not contempt. If words are not contempt, perforce the use of the summary power to immediately

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[12](...continued)
F.2d 12 (2d Cir. 1984) — a case involving far more egregious words than were spoken here — but in which the Court of Appeals there held that Due Process required that Lumumba be given a hearing before a different judge — obviously on the issue of intent to obstruct.

[13] Judge Motley's Certification stated that she "fined Mr. Hochheiser . . . for deliberately challenging and arguing with the court in the presence of the jury and for deliberately attempting to bring about a mistrial" (App. 20a-21a). An "attempt", however — though it might warrant sanctions by disciplinary panels — is not the "actual obstruction" that § 401 requires.

punish counsel for the use of his words was abusive.

The decision of the Court of Appeals not only contravenes McConnell; it is also at odds with a previous decision of the Second Circuit in which "words of reproach directed in open court to a judge's order during the course of the trial" were held not to warrant summary contempt as a matter of Due Process. United States v. Lumumba, 741 F.2d 12 (2d Cir. 1984). The lawyer there "shot arrows of insult at the trial judge", calling him (among other things) an "outstanding bigot" and "a racist dog", and in the presence of the jury defied orders to "be quiet and sit down." Despite repeated obstreporous conduct that actually interrupted examinations of the jury and/or witnesses, the Second Circuit ruled that the attorney was not

properly held in summary contempt under Rule 42(a) and that Due Process required notice and an opportunity to be heard--a holding flowing from this Court's decision in Mayberry v. Pennsylvania, 400 U.S. 455 (1970), recognizing that summary contempt is not proper for even the vilest of words spoken in open court (there, consisting of calling the judge "a hatchet man for the State," "a dirty sonofabitch," a "dirty, tyrannical old dog," and a "bum"). Neither of these cases -- indeed, no case -- gives any basis to treat Mr. Hochheiser's conduct as summary contempt or warrants a finding that he had fair notice that his words could be punished at all, much less summarily.[14]

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[14] The Court of Appeals also stated that "the district court's prior contempt citation of Mr. Thau put Mr. Hochheiser on notice that the (continued...)

It is no proper distinction, as the Court of Appeals' parenthetical treatment of Lumumba suggested (App. 9a), that the judge who cited Lumumba for contempt waited until the end of trial to file a Certificate and impose sanctions. If "words", without intent, were contempt as the Second Circuit held here, there would have been nothing to try on the remand ordered in Lumumba. Nor can Due Process rights be made applicable only on the unreviewable determination of a trial judge to impose punishment immediately and call it proper under Rule 42(a).

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[14](...continued)
court intended to issue contempt fines for conduct it thought disruptive" (App. 12a). Aside from the fact that Judge Motley withdrew the prior contempt citations against Mr. Thau, notice to another attorney about other conduct is hardly the type of notice that Due Process demands nor a proper standard for contempt: the judge's personal sensibility cannot properly be the determining factor of what is and is not contumacious under § 401.

There is no more of an "immediate necessity to punish" here than there was in Lumumba or Mayberry; indeed, there was no necessity, as McConnell holds. A judge cannot create a necessity merely by imposing the sanction immediately, and justifying the necessity on the basis of its own bootstrapping -- and this Court should grant the Writ to so state.[15]

II. This Court Should Grant The Writ To Enunciate Needed Standards For The Use Of Summary Contempt Power Under Rule 42(a) For Conduct Occurring During A Trial

The Court of Appeals held that the summary procedure was proper under Rule 42(a) -- and that Rule 42(b)'s requirements of notice and a hearing did

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[15] In Bloom v. Illinois, 391 U.S. 194 (1968), this Court, holding that a jury trial was necessary for criminal contempts, noted the possibility for arbitrary or oppressive conclusions by judges imposing summary contempt. The Court should reaffirm Bloom.

not here apply -- because the "words" were spoken during a trial, and because, as this Court held, a court has a "special need to maintain order and a deliberative atmosphere" in that a "courtroom is a hallowed place where trials must proceed with dignity". Codispoti v. Pennsylvania, 418 U.S. 506, 514 (1974). Neither Codispoti, however, nor any other case sanctions summary contempt in this circumstance.

Aside from the fact that the grant of certiorari in Codispoti was expressly limited to the issue whether petitioners should have been afforded a jury trial--precluding any notion that the Court there approved of summary contempt for every "disturbance" in a courtroom--this Court has held that in all situations except for those in which there is a "compelling reason for an

immediate remedy", United States v. Wilson, 421 U.S. 309, 318 (1975), a judge must proceed under Rule 42(b), which provides for notice and a hearing before a judge other than the judge offended by the perceived misconduct.

The Court of Appeals, however, appeared to regard as unreviewable the trial court's own conclusion that there was a "compelling reason for an immediate remedy" -- merely on the basis that Judge Motley imposed the remedy immediately. Indeed, citing cases of this Court, the Court of Appeals went even further, expressly holding that any alleged contempt committed during a trial could be punished without notice and a hearing, stating:

> When the contumacious conduct occurs in open court during an ongoing trial, summary disposition under Rule 42(a) is appropriate. . . .

This Court's decisions, however, do not sanction the deprivation of notice and a hearing for every "disturbance" of an ongoing trial -- and this Court should grant the Writ to so state and to enunciate needed standards for the use of Rule 42(a)'s summary procedures.

That the Court of Appeals' confusion is in fact premised on this Court's prior decisions, which thus need clarification, is shown by the earlier decision in United States v. Lumumba, supra, 741 F.2d 12 (2d Cir. 1974). Lumumba was cited parenthetically in this case (as quoted in the footnote below[16]) for the

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16 The Court's opinion thus reposes total discretion in the trial judge, as follows:

> Rule 42(b) may in some circumstances be a more appropriate procedure for contempt occurring in the court's presence. See Harris, 382 U.S. at 166-67 (grand jury proceedings); In Re
>
> (continued...)

proposition that Rule 42(b) may also be "appropriate" in trial contexts but is disretionary, and not implicated where a judge imposes punishment immediately. Noting that the law of contempt had been changed by developments in this Court's decisions, the Lumumba Court cited Mayberry v. Pennsylvania, 400 U.S. 455 (1971) for the proposition that "where the trial judge fails to act 'the instant the contempt is committed'", it is "wise[r]" to await the end of the trial and permit a hearing before a different

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[16](...continued)
Pilsbury, 866 F.2d 22, 26-27 (2d Cir. 1989) (status conference); United States v. Lumumba, 741 F.2d 12, 15-17 (2d Cir. 1984) (adjudication and punishment deferred until after trial). But during a trial, the court has a special need to maintain order and a deliberative atmosphere because a "'courtroom is a hallowed place where trials must proceed with dignity.' " Codispoti v. Pennsylvania, 418 U.S. 506, 514 (1974) . . . .

judge. The Court's conclusion in this case, however -- which accords total discretion to the trial court if, as here, it acts "the instant the contempt is committed", is a conclusion so dangerous to the proper functioning of the judicial process that the decision ought to be reviewed and reversed, and standards enunciated for the proper use of Rule 42(a).

Indeed, this Court has never held that every disturbance during a trial requires an immediate remedy. Codispoti itself pointed to a courtroom which had become "a bedlam" -- far from a ten-word utterance such as occurred here. And in Yates v. United States, 355 U.S. 66, 70 (1957), the Court discussed summary contempt power as a device needed to control "the disorderly and violent". Plainly, if all that occurred is the

utterance of words (which cannot be punished at all under McConnell), there can be no need for an immediate remedy--and a judge should not be allowed to insulate a criminal conviction from Due Process protections merely because of his decision to issue a Certification immediately instead of awaiting the conclusion of the trial. This Court should thus grant the Writ to explain that its prior decisions do not sanction such a result as was reached here. Cf. In re Snyder, 472 U.S. 634 (1985), reversing the suspension of an attorney from practice before courts in the Eighth Circuit because his conduct -- using "disrespectful" words to criticize -- was improperly found so "prejudicial to the administration of justice" as to be called "contumacious conduct" warranting suspension. "[E]ven assuming that the

letter exhibited an unlawyerlike rudeness, a single incident of rudeness . . . does not support a finding of contemptuous . . . conduct".

III. This Court Should Grant The Writ To Reverse This Unfair Conviction Found By A Biased Judge And To Reaffirm Rule 42(b)'s Prohibition Of A Judge Acting As Factfinder In A Criminal Contempt Context Such As Occurred Here

We have shown that "deliberately challenging and arguing with the court in the presence of the jury" is no basis for a finding of criminal contempt (much less contempt imposed without notice and a hearing). Assuming arguendo, however, that the fact of the jury's "retirement" (when the court, wishing to impose an additional sanction, sent the jury from the room) constituted an obstruction -- a finding, however, not made in Judge Motley's Certification, thus showing the

impropriety of the conviction in any event -- the Court of Appeals could have properly upheld a criminal conviction under 18 U.S.C. § 401 only if petitioner's words were spoken with the intention to obstruct. See In re Williams, 509 F.2d 949 (2d Cir. 1975) (citing cases). The determination that Mr. Hochheiser had such an intent was made in violation of Rule 42(b) and the most fundamental Due Process rights to notice and a hearing before an impartial factfinder.

Thus, the only basis in the court's Certification (quoted below)[17] that

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[17] The Certification premised the conviction on the purpose and intent of petitioner's words, as well as on his supposed "knowledge" (as to which the judge herself was the sole witness). That Certification reads (with the intent issues underscored):

> The court . . . fined Mr. Hochheiser . . . $500 for deliberately challenging

(continued...)

would, if true, arguably support a conviction for contempt, is the charge that petitioner "deliberately attempt[ed] to bring about a mistrial" by uttering "disrespectful" words in the presence of the jury. This specification required a finding that Mr. Hochheiser knew that the jury was entering the courtroom while he spoke and acted with intent to obstruct. Not only is the record devoid of evidence (much less proof beyond a reasonable doubt)[18] to support such a conclusion of intent, but, as discussed in footnotes 6

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[17](...continued)
and arguing with the court in the presence of the jury and for deliberately attempting to bring about a mistrial [App. 20a-21a].

[18] The Court in Bloom v. Illinois, 391 U.S. 194 (1968) held that a criminal contempt conviction requires the same Due Process protections as any criminal conviction. This, the Court said, was to avoid "arbitrary" and "oppressive" conclusions of contempt that can unfortunately be made in the heat of the moment by a judge who has no opportunity to reflect.

and 8 above, there is strong evidence supporting Mr. Hochheiser's defense: but neither Judge Motley nor the Court of Appeals permitted an opportunity to present it.

The Court of Appeals, ignoring the issue of intent because of the erroneous premise that "words" uttered during trial and deemed "reproachful" by the judge could be punished without explanation or a hearing, nonetheless commented that the trial judge's "finding that Hochheiser was aware at the time when he spoke that several members of the jury were in the back of the courtroom is persuasive" (App. 12a (emphasis added)). Respectfully, "persuasive" cannot substitute for the "reasonable doubt" standard. Nor, of course, is there justification for a lesser standard of proof of the specifications in a summary contempt

Certification than for a charge submitted to a hearing. There is no less a criminal conviction in the summary context as in the other case, and both requires a finding of an "intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice." In re Pilsbury, 866 F.2d 22, 27 (2d Cir. 1989), discussing 18 U.S.C. § 401.

Nor is the trial judge's finding "persuasive" at all. There is, to the contrary, strong reason to doubt the accusing court's "finding." Indeed, a multitude of Supreme Court cases explain the reason why judges should not make adjudications of contempt when they are on the receiving end of what they deem "words of reproach" and suggest the inherent unfairness and unreliability of their findings if they do: "there is some

residue of aggravation on the judge's part" which obviously skews the fact finding process; to ignore such a basis of bias would be "unrealistically to hold that trial judges are not also human." United States v. Lumumba, supra, 741 F.2d at 16. See also Offutt v. United States, 348 U.S. 11, 13 (1954) ("But judges are also human, and may, in a human way, quite unwittingly identify offense to self with obstruction of law."). Rule 42(b), indeed -- quoted in the footnote below[19] -- specifically incorporates the reasoning of these cases.

Notwithstanding these pronouncements, however, the Court of Appeals here "unrealistically" ignored the circum-

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[19] Rule 42(b) provides that if "the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

stances preceding the summary fact-finding that supported the contempt citation here. Less than two minutes before Judge Motley accused and, without giving him any chance to defend, found that Mr. Hochheiser "deliberately" spoke in the jury's presence and with obstructive intent, she had erroneously deemed this attorney's proper advocacy on behalf of his client a criminal affront to the court of the sort requiring immediate punishment. Without cause, she believed that the attorneys were part of a "contempt plot" (Tr. 1339), and cited Mr. Hochheiser summarily for criminal contempt as a result. To allow this obviously biased fact finder to have the only say in a criminal conviction cannot be the process to which, under the Constitution or Rule 42(b), Mr. Hochheiser is due.

The record, indeed, contains nothing to support Judge Motley's conclusion that Mr. Hochheiser intended to obstruct; to the contrary, it shows his intent to further justice -- by arguing against the unjust curtailment of a proper line of defense and the abusive use of the summary contempt power for that purpose. If he chose the wrong words (though, we submit, strong words are not an unacceptable response to an abuse of judicial power such as occurred here), his momentary lapse, though regrettable, was "only human" -- a characteristic of attorneys no less than of judges. If Mr. Hochheiser is not entitled to summary reversal because of the lack of evidence of intent,[20] at the very least, Due

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[20] Under the circumstances, this Court would be warranted in granting certiorari and summarily reversing: on this evidence, there

(continued...)

Process, as embodied in Rule 42(b), requires a hearing before an unbiased judge and an opportunity to present a defense. This Court should grant the Writ both to confirm the meaning of Rule 42(b), and to correct a criminal conviction that is so at odds with the Constitution that its reversal is essential to justice.

The decision by the Court of Appeals here, we respectfully submit, was an emotional reaction instead of a judicial one. This Court has repeatedly held that the contempt power may be subject to abuse by a judge whose emotion overruns his balance. That, respectfully, is what occurred here, and this Court should

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[20](...continued)
should be no further proceedings under the principles of Burks v. United States, 437 U.S. 1 (1978) (no retrial after reversal for insufficient evidence).

grant the Writ to assure that such an abuse as occurred here -- the sanctioning of counsel for presentation of a vigorous and proper defense and for criticizing the court for curtailing it -- does not threaten the cornerstone of justice and does not unfairly brand this practitioner a criminal for doing no more than defacing a hypersensitive judge's sensibilities.

CONCLUSION

This Court should grant the writ and reverse the judgment of conviction.

Respectfully submitted,

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APPENDICES

CONCLUSION

This Court should grant the writ and reverse the judgment of conviction.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 459—August Term 1989

(Argued November 20, 1989

Decided February 15, 1990)

Docket No. 89-1274

UNITED STATES OF AMERICA,

Appellee,

—v.—

FEDERICO GIOVANELLI, STEVEN MALTESE, and CARMINE GUALTIERE,

Defendants.

IN RE CRIMINAL CONTEMPT ORDER OF JUDGE MOTLEY, entered on May 22, 1989, against LAWRENCE HOCHHEISER, an Attorney and ROLAND THAU, Contemnor,

LAWRENCE HOCHHEISER, ESQ.,

Appellants.

Before:

OAKES, *Chief Judge*, CARDAMONE, *Circuit Judge* and POLLACK, *District Judge**

Appeal from an order, entered May 22, 1989 in the United States District Court for the Southern District of New York (Motley, J.), adjudicating appellant in criminal contempt for his conduct as an attorney in a criminal trial.

Affirmed in part, reversed in part.

VIVIAN SHEVITZ, New York, New York (Georgia J. Hinde, New York, New York, of counsel), *for Appellant Lawrence Hochheiser.*

ADAM S. HOFFINGER, Assistant United States Attorney for the Southern District of New York, New York, New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, David E. Brodsky, Assistant United States Attorney, New York, New York, of counsel), *for Appellee United States of America.*

* Honorable Milton Pollack, United States Senior District Judge, Southern District of New York, sitting by designation.

CARDAMONE, *Circuit Judge*:

We review an order that summarily held an attorney in criminal contempt for his courtroom misbehavior on two separate occasions, both occurring in the judge's presence. On the first occasion, defense counsel posed a series of questions in cross-examination that the trial judge believed she had previously ruled improper; on the second occasion, counsel addressed angry and defiant remarks to the judge as a result of the contempt sanction she had imposed for his earlier conduct. Words of reproach directed in open court to a judge's order during the course of trial must be dealt with swiftly and firmly, since to allow such conduct to go unsanctioned risks the serious erosion of the court's authority to conduct the proceedings before it.

Lawrence Hochheiser appeals from an order entered on May 22, 1989 in the United States District Court for the Southern District of New York (Motley, J.), that fined him $250 for repeatedly attempting to lay a foundation to admit a document into evidence after the court had ruled the document inadmissable. An additional $500 fine was imposed for his deliberately challenging remarks addressed to the trial court in the presence of the jury. For the reasons that follow, we reverse the order insofar as it imposed a $250 fine, but affirm the $500 fine.

FACTS

Attorney Hochheiser's $750 contempt sanction occurred during his defense of Federico Giovanelli, who, along with two co-defendants, was being tried for viola-

tions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c), (d) (1988), based on underlying acts of illegal gambling, loansharking, murder and attempted murder. *See United States v. Giovanelli*, No. S 88 Cr. 954 (CBM) (S.D.N.Y. May 19, 1989). It is unnecessary to set forth the details of the underlying trial in the process of which the incidents that led to the contempt sanctions arose. The hotly contested nature of the trial and the severity of the charges against the three defendants may be gleaned from allegations that the defendants had murdered police officer Anthony Venditti and attempted to murder police officer Kathleen Burke. The first contempt citation in the course of the two and one-half months trial was levied against counsel for one of Giovanelli's co-defendants. He was sanctioned by the district court on May 16, 1989 for improper remarks made in his opening statement. Two days later—on May 18—Hochheiser was sanctioned during his cross-examination of a government witness, Special Agent Michael Gillispie of the Federal Bureau of Investigation.

Gillispie's testimony on direct examination related to his observations of defendant Giovanelli on September 10, 1985, approximately three and a half years earlier. Gillispie testified that on that date he saw Giovanelli depart from his residence in Queens at 5:07 p.m. in a maroon BMW bearing New York license plate number 5272 BEZ. He stated that the BMW arrived at 208 Sullivan Street in Manhattan at approximately 5:31 p.m. He observed Giovanelli exit the automobile and enter 208 Sullivan Street. Gillispie also noted that at 5:36 p.m. Giovanelli again entered 208 Sullivan Street.

On cross-examination Attorney Hochheiser focused on a written surveillance report used in the investigation and furnished by the government to defense counsel. He elicited the fact that on the morning of the trial Gillispie had studied the surveillance report or log in order to memorize the details of his 1985 observations. Defense counsel then sought to have the witness read portions of the log into the record, but the trial judge would not permit Gillispie to read from it, stating that the document had not been received in evidence. Hochheiser then offered the report in evidence, but the trial court refused to receive it, concluding that it was hearsay. Judge Motley then ruled that the report could be used to refresh the witness' recollection, but that it would not be admitted into evidence, and instructed counsel: "Don't ask him to read from the document." After further questioning about the log, Hochheiser offered it in evidence as a past recollection recorded. After a brief *voir dire* by the government, the court determined that Gillispie's recollection had already been refreshed by reviewing the report, and that the report itself was inadmissable.

Appellant next began a line of questioning seeking to impeach the credibility of Gillispie's testimony on the grounds that his present memory of the events of September 10, 1985 was flawed. The questions sought to determine what part of the agent's testimony he actually recalled based on his observations in 1985 and what portions he recalled based on studying the log. Believing that this line of questioning was another attempt on counsel's part to lay a foundation for the admission of the report as a past recollection recorded, the trial judge stated: "I have already ruled that that document is not coming in evidence. Move on to some other subject." When Hochheiser persisted in his attempt to impeach

the witness' memory, the court and counsel had the following exchange:

> THE COURT: Again, I have already ruled on that subject.
>
> MR. HOCHHEISER: I didn't ask to have the report put in. I am asking him if he relied on the accuracy of the report.
>
> THE COURT: You have already gone over it. So there is no use laying a foundation for your motion. I have already ruled on it.

The following question was then asked by Hochheiser: "[A]re you relying on your recollection of seeing Mr. Giovanelli enter 208 Sullivan Street, or are you telling us that you know it to be so for some other reason?"

At that point the court excused the jury and held Hochheiser in contempt of court. A fine of $250 was imposed for "wilfully disobey[ing] and violat[ing] the rulings of the court by repeatedly attempting to get an FBI agent's written report into evidence as a past recollection recorded in contravention of the court's prior determination against admission of such report." Judge Motley then ordered that the jury be brought back, at which point Attorney Hochheiser began to protest the imposition of sanctions. The judge stated that she had ruled, and would not entertain further argument on the issue. She again ordered that the jury be returned. As the jury was filing in, Hochheiser stated "I won't pay. You can put me in jail, Judge." Judge Motley excused the jury and fined Hochheiser $500 for his show of defiance before the jury.

On May 22, 1989 the district court issued a written certification and order pursuant to Rule 42(a) of the

Federal Rules of Criminal Procedure that specified the basis for the contempt citations. Payment of the $750 in fines was stayed until the end of the trial.

DISCUSSION

A. *Summary Contempt Power*

Contempt may be traced back to the King's Court or *Curia Regis*. After the Norman Conquest the King's Court became a supreme royal court national in character, *see* T. Plucknett, *A Concise History of the Common Law* 132-33 (2d ed. 1936), so that offenses against it were said to be offenses against the Crown. That is the lineage in this country for a contempt of court being considered an offense against the state rather than an offense against the presiding judge personally. Summary punishment is warranted for contempt in the face of the court because of the state's need to maintain the court's dignity as well as public respect for it and its orders. 17 Am. Jur. 2d *Contempt* § 2 (1964).

The power to impose punishment summarily for contempt is now conferred on a federal court by statute. *See* 18 U.S.C. § 401 (1988). Insofar as here pertinent, that statute grants a court of the United States "power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." § 401(1). Federal Rule of Criminal Procedure 42(a) was promulgated to regulate the exercise of the power conferred by § 401. Rule 42(a) provides as follows:

> Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the

> judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Thus, the statute and the rule establish the requisites for summary punishment of contempt to be (1) contemptuous misbehavior, (2) committed in the actual presence of the court, (3) which obstructs the administration of justice. Such summary assertion of a court's authority has been exercised, according to Blackstone, "as early as the annals of our law extend." 4 W. Blackstone, *Commentaries* 282-83 (Univ. of Chicago ed. 1979). A federal judge has always had the power upon the commission of contempt in open court on its own initiative, without taking further proof, entertaining an explanation, or conducting a hearing to hold the culpable person in contempt and to impose such punishment as the court, in the exercise of its discretion, thinks fit. *Cooke v. United States*, 267 U.S. 517, 534-35 (1925); *Ex Parte Terry*, 128 U.S. 289, 309 (1888).

The power to punish summarily misbehavior occurring in the face of a trial court, without first giving notice and an opportunity to be heard, is upheld today in "exceptional circumstances" *see Harris v. United States*, 382 U.S. 162, 164 (1965), and "where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court." *Johnson v. Mississippi*, 403 U.S. 212, 214 (1971) (per curiam); *see United States v. Ruggiero*, 835 F.2d 443, 444 (2d Cir. 1987); *United States v. Martin-Trigona*, 759 F.2d 1017, 1024-25 (2d Cir. 1985).

Appellant contends that in this case there was no "compelling reason for an immediate remedy," *see United States v. Wilson*, 421 U.S. 309, 318 (1975), and therefore Rule 42(b)—requiring notice and a hearing before issuing a contempt order—was the appropriate remedy. We disagree. When the contumacious conduct occurs in open court during an ongoing trial, summary disposition under Rule 42(a) is appropriate. *See id.* at 315, 319. Rule 42(b) may in some circumstances be a more appropriate procedure for contempt occurring in the court's presence. *See Harris*, 382 U.S. at 166-67 (grand jury proceedings); *In Re Pilsbury*, 866 F.2d 22, 26-27 (2d Cir. 1989) (status conference); *United States v. Lumumba*, 741 F.2d 12, 15-17 (2d Cir. 1984) (adjudication and punishment deferred until after trial). But during a trial, the court has a special need to maintain order and a deliberative atmosphere because a " 'courtroom is a hallowed place where trials must proceed with dignity.' " *Codispoti v. Pennsylvania*, 418 U.S. 506, 514 (1974) (quoting *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Douglas, J., concurring)). Thus, use of Rule 42(a) under the circumstances of this case was appropriate. We turn now to discuss the two separate contempts found here.

B. *The First Contempt*

Appellate courts are charged with a duty to guard against abuses of discretion in trial courts' use of Rule 42(a). *See Wilson*, 421 U.S. at 319. When an attorney is held in contempt for continuing to press a legal claim in contravention of a court order, it is an appellate court's duty to safeguard not only the judge's power to free his courtroom from disruption, but also to safeguard counsel's ability to make good-faith efforts to present his cli-

ent's case. *See In re McConnell*, 370 U.S. 230, 236 (1962). Counsel has a right to press argument on a court and to direct a line of questioning of a witness that may not at the moment appear relevant to the trial judge. *See Maness v. Meyers*, 419 U.S. 449, 459, n.7 (1975); *Sacher v. United States*, 343 U.S. 1, 9 (1952). Attorney Hochheiser claims that his line of questioning of Agent Gillispie was a proper exercise of his obligation to represent his client zealously, and that the court's ruling on the admissability of the surveillance log did not clearly forbid him from attempting to impeach the witness' memory.

To sustain a finding of contempt, the order allegedly violated must have been reasonably clear. *See In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975); *accord United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974); *see also United States v. Lumumba*, 794 F.2d 806, 810 (2d Cir.) ("when the directive is clear and counsel understands it, he must obey even if he feels his obedience may risk prejudicing his client's substantive case."), *cert. denied*, 479 U.S. 855 (1986). The certification order entered by Judge Motley states that she viewed Hochheiser's line of questioning as an attempt to lay a foundation to admit the surveillance log in evidence as a past recollection recorded after she had ruled the document inadmissable. Hochheiser asserts that he was merely attempting to impeach the witness with respect to his memory of past events, which is, of course, a common litigation tactic. *See* 3 Wigmore, *Wigmore on Evidence* § 730 (Chadbourn rev. 1970).

Past recollection recorded is a common law exception to the hearsay rule, *see* C. McCormick, *McCormick on Evidence* § 299 (2d ed. 1972), codified in Fed. R. Evid.

803(5): "Recorded Recollection. —A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly . . . ." Although a similar line of questioning may be used either to lay a foundation to admit a document as a past recollection recorded or to impeach a witness' memory, the record reflects that here the judge's order applied to the former and not to the latter line of questioning. Hence, the trial judge by its ruling was foreclosing one line of inquiry, while defense counsel was pursuing another.

Looking at the court's order in this light, it cannot be concluded beyond a reasonable doubt that it was willfully disobeyed. *See Williams*, 509 F.2d at 960. As a consequence, the first contempt sanction is reversed insofar as it fined Hochheiser $250 upon a finding that he was attempting to lay a foundation for admission of the surveillance log in evidence.

C. *The Second Contempt*

The second contempt was based on an insolent remark made directly to the judge, rather than a failure to obey a court order. Although the contempt power should not be used in a manner that impinges on legitimate advocacy, a judge need not tolerate disrespect or a deliberate show of defiance in open court. To affront the dignity of the court the misbehavior need not insult the judge personally, but may consist of threats, disrespect or other like behavior. *E.g.*, *Codispoti*, 418 U.S. at 514; *Cooke*, 267 U.S. at 536. An attorney's desire to

vent his frustration at the court over an adverse evidentiary ruling—even over what counsel perceives as an improper contempt citation—does not take precedence over the overriding need to preserve a court's authority and to maintain order in the courtroom. Had Hochheiser desired to contest the adverse citation his remedy was to pursue an appeal, not to defy the court. *See, e.g., Maness*, 419 U.S. at 459-60; *Sacher*, 343 U.S. at 9; *Lumumba*, 794 F.2d at 810.

Counsel asserts he was unaware of the fact that the jury had returned, and that he was entitled to a hearing on the issue of his awareness of its presence. The trial transcript reveals the court reporter had noted the jury re-entering the courtroom before Hochheiser spoke. Further, the trial judge's finding that Hochheiser was aware at the time when he spoke that several members of the jury were in the back of the courtroom is persuasive. A trial judge is within her rights as the presiding judicial officer at a trial to adjudicate counsel in contempt of court for challenging her authority in the presence of several members of the jury, even though the entire jury was not present. *Cf. United States v. Marra*, 482 F.2d 1196, 1201 (2d Cir. 1973) (presence of jury did not significantly add to the disruption caused).

Additionally, the district court's prior contempt citation of other counsel put counsel on notice that the court intended to issue contempt fines for conduct it thought disruptive. When counsel for Giovanelli's co-defendant was sanctioned earlier in the trial, the court stated that "the purpose of that is to curb any future contempt on the part of any lawyer in this case" and "I hope we don't have this occur again in this trial, but if it should, if I get another lawyer disobeying my order,

the amount is going up to $500." This was not a case where a "reasonable person would not know that the court considered his conduct contemptuous," *Pilsbury*, 866 F.2d at 27.

In sum, it is plain that there was in this second instance contemptuous behavior committed in the actual presence of the court. Here was not only an expression of frustration, but at the same time contempt for the authority of the court. This misbehavior required the jury, which had just returned to the courtroom, to retire once again and in that way actually obstructed the administration of justice. Hence, since its requisites have been met, the exercise of the summary contempt power under § 401 and Rule 42(a) was not an abuse of the district court's discretion.

CONCLUSION

The order appealed from is reversed insofar as it imposed a $250 fine based on appellant's attempt to have the surveillance report admitted in evidence. The balance of the order, adjudicating appellant in contempt and imposing a $500 fine for a deliberate and defiant comment in open court in the presence of several members of the jury, is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of April, one thousand nine hundred and ninety.

Docket No. 89-1274

UNITED STATES OF AMERICA,

Appellee,

against

FEDERICO GIOVANELLI, STEVEN MALTESE and CARMINE GUALTIERE,

Defendants.

IN RE CRIMINAL CONTEMPT ORDER OF JUDGE MOTLEY entered on May 22, 1989, against LAWRENCE HOCHHEISER, an Attorney,

LAWRENCE HOCHHEISER, ESQ.,

Appellant.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellant Lawrence Hochheiser

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

\s\ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 89-1274

UNITED STATES OF AMERICA

v.

FEDERICO GIOVANELLI, et al.,

In Re Criminal Contempt Order against Lawrence Hochheiser, an Attorney.

[On consideration of appellant Lawrence Hochheiser's timely motion to enlarge the time within which to file a petition for rehearing, with a suggestion of rehearing en banc, from February 28, 1990, to March 28, 1990]

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

\s\ Richard J. Cardamone
Circuit Judge

Date: March 1, 1990

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 88 Cr. 954 (CBM)

UNITED STATES OF AMERICA

-v-

FEDERICO GIOVANELLI, a/k/a "Fritzy",
STEVEN MALTESE, and
CARMINE GUALTIERE, a/k/a "Buddy"

CERTIFICATION AND ORDER

On May 18, 1989, defense attorney for defendant Federico Giovanelli in the above-captioned case, Lawrence Hochheiser, Esq., wilfully disobeyed and violated the rulings of the court by repeatedly attempting to get an FBI agent's written report into evidence as a past recollection recorded in contravention of the court's prior determination against admission of such report.

After asking the witness to read from the report which was not in evidence, Mr. Hochheiser was told by the court that the prior written report could not be admitted in evidence, but could only be used to refresh the witness's recollection or to impeach his credibility, unless the document can be fitted into certain exceptions which would allow its admission as evidence. See Transcript, May 18, 1989, at 303-04. Mr. Hochheiser, after cross-examining the witness further, then asked to have the document admitted as a past recollection recorded. Id. at 310. Upon the government's objection to the introduction of the document, on the grounds that its voir dire of the witness reveals that the witness has a refreshed recollection as to matters in the report, id. at 313, the court sustained the

government's objection and ruled against the admission of the document. Id. Mr. Hochheiser, however, proceeded to try to lay the same foundation, by challenging the witness's refreshed recollection, for admitting the document as a past recollection recorded. Id. at 315. The court advised Mr. Hochheiser that the court had already made its ruling. Id. Mr. Hochheiser continued to question the witness on the same subject in the same manner, to lay the same foundation, challenging the witness's memory and suggesting that the witness was only reading from and relying on the accuracy of the report, not on his own refreshed memory. Id. The court once again told Mr. Hochheiser that "there is no use laying a foundation for your motion. I have already ruled on it." Id. Ignoring the court's statement, Mr. Hochheiser

persisted in the same line of questioning, again challenging the witness's recollection, whereupon the court excused the jury and cited Mr. Hochheiser for contempt of court, fining him $250.

The court thereupon ordered the jury brought back into the courtroom. While the jury was being brought back into the courtroom from the jury room, as the court ordered, and while several jurors were already in the back of the courtroom, Mr. Hochheiser protested and told the court the following: "I won't pay. You can put me in jail, Judge." Id. at 316-17. The court ordered the jury back out and fined Mr. Hochheiser an additional $500 for deliberately challenging and arguing with the court in the presence of the jury, id. at 317, and

for deliberately attempting to bring about a mistrial. Id. at 484.

In accordance with Fed. R. Crim. P. 42(a), the court finds that Mr. Hochheiser's deliberate disobedience of the rules of the court and deliberate challenge of the court in the presence of the jury, committed in the actual presence of the court, constituted contempt of court. Mr. Hochheiser is therefore held in contempt of court and fined a total of $750. Mr. Hochheiser's request for the court to stay the payment of the fines until the end of the trial is granted.

So ordered.

New York, New York
May 22, 1989

\s\ Constance Baker Motley
CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fifteenth day of February, one thousand nine hundred and ninety.

PRESENT: HON. JAMES L. OAKES, Ch. J.
HON. RICHARD J. CARDAMONE, C.J.
HON. MILTON POLLACK, D.J.*

Circuit Judges,

Docket No. 89-1274

UNITED STATES OF AMERICA, Appellee,

-V.-

FEDERICO GIOVANELLI, STEVEN MALTESE and CARMINE GUALTIERE, Defendants.

IN RE CRIMINAL CONTEMPT ORDER OF JUDGE MOTLEY entered on May 22, 1989, against LAWRENCE HOCHHEISER, an Attorney, and ROLAND THAU, CONTEMNOR,

LAWRENCE HOCHHEISER, ESQ., Appellant.

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* Hon. Milton Pollack, Senior U.S. District Judge, for the Southern District of New York, sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this Court.

Elaine B. Goldsmith
Clerk
\s\ Edward J. Guardaro
By: Edward J. Guardaro
Deputy Clerk

Issued as Mandate: May 29, 1990

APPENDIX F

PERTINENT STATUTORY PROVISIONS AND RULES

18 U.S.C. § 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

* * * * *

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.